IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 252

HARVEY LYLE ENTSMINGER,

Petitioner,

vs.

IOWA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

BRIEF OF PETITIONER

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INDEX

SUBJECT INDEX

CITATIONS

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BRIEF OF PETITIONER

The opinion delivered in the court below is entitled *State of Iowa* v. *Entsminger,* and is reported at 137 N.W.2d 381 (1965).

Statement of Jurisdiction

This United States Supreme Court granted petitioner's petition for writ of certiorari, and this Court has jurisdiction by authority of 28 U.S.C. 1257(3) because petitioner specially sets up and claims a right under the Constitution of the United States.

Included in the issues in this case, are a search and seizure question and a self-incrimination question involving the Fourth, Fifth and Fourteenth Amendments of the United States Constitution. Although the Supreme Court of Iowa when it affirmed petitioner's conviction did not have before it a transcript, abstract or summary of the trial record or any brief or argument, it necessarily passed upon these issues which were presented to the trial court in a motion for new trial; this motion was included in the "Clerk's Transcript", which was before the Iowa Supreme Court at the time it affirmed petitioner's conviction.

That the Supreme Court of Iowa, in passing on these issues, made no reference to them in its opinion does not preclude this Court from taking jurisdiction to consider the questions. *Toledo, St. Louis and Western Railroad Company* v. *Slavin,* 236 U.S. 454 (1915). If this Court finds unconstitutional the appellate procedure by which petitioner's conviction was affirmed, it may decide a federal question which was not, because of an unconstitutional or inadequate state procedure, effectively considered by the state court. *NAACP* v. *Alabama,* 357 U.S. 449 (1958).

The case presently before the Court must be distinguished from cases in which a state had denied completely to an indigent his right to appeal. In such cases, e.g. *Griffin* v. *Illinois,* 351 U.S. 12 (1956), this Court may not have reached substantive federal questions because the state appellate court had never purported to decide any questions involved in the appeal, but instead for some reason denied altogether the opportunity to appeal. In the present case, the Supreme Court of Iowa did purport to decide all questions presented to it by the "Clerk's Transcript", and, purporting to grant petitioner an appeal, affirmed his conviction.

Of course, as shown in Divisions I and II of the petitioner's brief, the procedure by which the Iowa Supreme Court appeal was allowed and was decided violated the rights of the petitioner under the equal protection clause of the Fourteenth Amendment.

Therefore, this United States Supreme Court has jurisdiction.

Constitutional Provisions, Statutes and Iowa Supreme Court Rules

This case involves the following constitutional provisions, statutes, and Iowa Supreme Court Rules:

CONSTITUTION OF THE UNITED STATES, AMENDMENT 4:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

CONSTITUTION OF THE UNITED STATES, AMENDMENT 5:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

without due process of law; nor shall private property be taken for public use, without just compensation."

CONSTITUTION OF THE UNITED STATES, AMENDMENT 6:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

CONSTITUTION OF THE UNITED STATES, AMENDMENT 14, SECTION 1:

" . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONSTITUTION OF THE STATE OF IOWA, ARTICLE I, SEC. 8:

"Personal security—searches and seizures.

Sec. 8. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized."

CONSTITUTION OF THE STATE OF IOWA, ARTICLE I, SEC. 9:

"Right of trial by jury—due process of law.

Sec. 9. The right of trial by jury shall remain inviolate; but the General Assembly may authorize trial by a jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law."

CONSTITUTION OF THE STATE OF IOWA, ARTICLE I, SEC. 10:

"Rights of persons accused. Sec. 10. In all criminal prosecutions, and in cases involving the life, or liberty of an individual the accused shall have a right to a speedy and public trial by an impartial jury; to be informed of the accusation against him, to have a copy of the same when demanded; to be confronted with the witnesses against him; to have compulsory process for his witnesses; and, to have the assistance of counsel."

28 U.S.C. 1257(3):

"State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

". . . (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

28 U.S.C. 1915 (a):

"(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

"An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith."

CODE OF IOWA, 1962, SECTION 718.2:

"*Uttering forged instrument.* If any person utter and publish as true any record, process, certificate, deed, will, or any other instrument of writing mentioned in section 718.1, knowing the same to be false, altered, forged, or counterfeited, with intent to defraud, he shall be imprisoned in the penitentiary not more than ten years, or imprisoned in the county jail not exceeding one year, or fined not exceeding one thousand dollars."

CODE OF IOWA, 1962, SECTION 793.1:

"*Office of appeal—who may appeal.* The mode of reviewing in the supreme court any judgment, action, or decision of the district court in a criminal case is by appeal. Either the defendant or state may appeal."

CODE OF IOWA, 1962, SECTION 793.2:

"*Time of taking—from final judgment only.* An appeal can only be taken from the final judgment, and within sixty days thereafter."

CODE OF IOWA, 1962, SECTION 793.6:

"*Duty of clerk when appeal is taken.* When an appeal is taken, the clerk of the court in which the judgment was rendered shall:

1. Forthwith prepare and transmit to the attorney general a certified copy of the notice of appeal, together with the date of the service and filing thereof.

2. Promptly prepare and transmit to the clerk of the supreme court a transcript of all record entries in the cause, together with copies of all papers in the case on file in his office, except those returned by the examining magistrate on the preliminary examination, all duly certified under the seal of his court."

CODE OF IOWA, 1962, SECTION 793.17:

"*Rules of procedure.* The record and case may be presented in the supreme court by printed abstracts, arguments, motions, and petitions for rehearing as provided by its rules; and the provisions of law in civil procedure relating to certification of the record and the filing of decisions and opinions of the supreme court shall apply in such cases."

CODE OF IOWA, 1962, SECTION 793.18:

"*Decision of supreme court.* If the appeal is taken by the defendant, the supreme court must examine the

record, without regard to technical errors or defects which do not affect the substantial rights of the parties, and render such judgment on the record as the law demands; it may affirm, reverse, or modify the judgment, or render such judgment as the district court should have done, or order a new trial, or reduce the punishment, but cannot increase it."

IOWA SUPREME COURT RULE 15, CODE OF IOWA, VOL. II (PAGES 2715-16):

"When an appeal is taken in a criminal case and the clerk's transcript of the record, required by section 793.6 of the Code, is filed with the clerk of this court, the cause shall be assigned for submission on such transcript, but the date set for such submission shall be not less than ninety days after the date the appeal was perfected as shown by such transcript."

IOWA SUPREME COURT RULE 16, CODE OF IOWA, VOL. II (PAGE 2716):

"If a defendant in a criminal case appeals and desires to submit the case upon a printed abstract of the record, brief and argument, he shall serve on the attorney general and file with the clerk of this court a notice to that effect, before the day set for the submission of the cause under the provisions of Rule 15. In that event, the appellant shall file the printed abstract of the record with the clerk of this court and serve a copy upon the attorney general within ninety days following the service and filing of the notice of appeal, unless, within such ninety days, additional time be granted by a judge of this court after notice and an

opportunity to be heard have been given to the attorney general, and the cause shall be reassigned for submission on a date at least ninety days subsequent to the filing of the printed abstract of the record. Appellant shall serve his brief and argument on the attorney general and file it with the clerk of this court within forty-five days after filing the abstract. The state shall have thirty days after the filing of appellant's brief within which to deny the abstract, serve and file amendment thereto and brief and argument. Appellant shall serve and file his reply brief within fifteen days after the state's brief is filed. A denial by the appellant of the state's additional abstract, if not confessed, will be disregarded unless sustained by a certification of the record."

Questions Presented for Review

1. Where Iowa Law provides for appeal as a matter of right, is there a violation of the constitutional rights of an indigent under the Fourteenth Amendment to the United States Constitution where a State appellate procedure (1) gives to appointed counsel for an indigent accused felon unreviewable discretion to decline, without his client's consent, to submit on appeal a transcript, abstract or summary of the trial record or briefs or arguments in support of the appeal, and (2) in case of such inaction by counsel, permits the appellate court to affirm an indigent's conviction solely on the basis of a collection of miscellaneous papers known as a "clerk's transcript", which does not include a transcript, abstract, or summary of the trial record or a brief or argument in connection therewith?

2. Where Iowa Law provides for appeal as a matter of right and where petitioner, an indigent, requested court appointment of counsel to prosecute an appeal from a trial court felony conviction, and where the lawyer appointed by the court did nothing to prepare and file a transcript, abstract or summary of the trial record or brief or argument on appeal, was the petitioner in this case denied the effective assistance of counsel on his appeal in violation of the Sixth Amendment or the Fourteenth Amendment to the United States Constitution?

3. Where the private correspondence of an accused is removed from his possession and placed in a safe at a jail at the time of his initial booking, and where these personal papers are removed from the safe by the State, without the consent of the defendant and without warrant, for evidentiary purposes of handwriting comparison in a prosecution for uttering a forged instrument, is there a violation of the Fourth, Fifth or Fourteenth Amendments to the United States Constitution, or Article I, Sections Eight, Nine, or Ten of the Constitution of the State of Iowa?

Statement of the Case

The petitioner, an indigent, was convicted in Polk County, Iowa, district court of the crime of uttering a forged instrument and was sentenced for a term of ten years in the state penitentiary where he is now incarcerated (R. 17, 20-21). During the trial there was lengthy testimony by the prosecution's purported handwriting experts, which in large part was based on comparing the handwriting on the instruments involved with the handwriting on two handwritten letters which were removed without petitioner's

consent from a safe at the Des Moines City Jail where his belongings were placed for safekeeping purposes at the time of his initial arrest.

After his conviction petitioner requested that a new counsel be appointed to prosecute an appeal to the Iowa Supreme Court, and this request was granted (R. 20). The newly appointed counsel filed a "Notice of Intention to File Printed Abstract of Record" on March 8, 1965, in which he advised the Attorney General of Iowa and the Iowa Supreme Court that "the defendant desires to submit the above entitled case upon a printed abstract of record and brief and argument" (R. 25).

Thereafter, court appointed counsel did not file either a printed abstract of record or a brief and argument. Accordingly, pursuant to Section 793.6 of the Code of Iowa, 1962, and Iowa Supreme Court Rule 15, the case was submitted before the Iowa Supreme Court on a "clerk's transcript", which does not include a transcript, abstract or summary of the trial record or a brief or argument.

The Iowa Supreme Court on or about October 19, 1965, affirmed the conviction of the defendant (R. 33). Petitioner's petition for a writ of certiorari was granted by this United States Supreme Court.

Statement of Facts

Petitioner Harvey Lyle Entsminger was arrested without a warrant on June 12, 1964, for a traffic violation in Des Moines, Iowa. At the time of petitioner's arrest, the Des Moines Police Department was looking for him because of a bad check which they believed he had passed. As was then customary, petitioner at the time of his booking at

the police station was asked to leave his personal effects with the jailer for safe-keeping. These effects included two letters handwritten by petitioner, which were placed by the jailer in an envelope and locked in a safe-type cabinet in the Des Moines City Jail.

On June 29, 1964, Lt. Carroll Dawson of the Identification Bureau of the Des Moines Police Department came to the jail to speak to petitioner. Lt. Dawson asked petitioner for a sample of petitioner's handwriting. Petitioner refused this request. However, when Dawson requested petitioner's fingerprints, petitioner acceded and also, pursuant to the policeman's demand, signed the fingerprint card.

Police Lieutenant Dawson had been present when the petitioner had been booked and consequently Lt. Dawson was aware that there were two handwritten letters of petitioner in the jail safe. Lt. Dawson testified that without petitioner's knowledge or consent Lt. Dawson obtained from the city jailer the keys to the safe and opened the safe and removed the two personal letters of the petitioner (see Exhibit A, pages 47-49). These two letters formed a vital link in the chain of evidence introduced against the petitioner and were the subject of lengthy testimony by each of the prosecution's handwriting experts. Objection by the court appointed trial counsel was made to the introduction of these two letters as having been unconstitutionally obtained (Exhibit A, page 49).

The petitioner was found guilty by a Polk County jury on October 6, 1964 (R. 18). On October 9, petitioner requested appointment of new counsel to file a motion for new trial and on October 16, the court appointed Henry

Wormley of the Des Moines, Iowa Bar to represent the petitioner (R. 19).

On October 23, Attorney Wormley, together with the trial court appointed counsel, Everett H. Albers, filed a motion for new trial. A major part of the motion and of the argument in support thereof concerned the alleged unconstitutional seizure and use of petitioner's two letters taken without his consent from the jail safe (see Exhibit B). The motion for new trial was overruled on October 23, and petitioner was sentenced for a term of not more than ten years in the Iowa State Penitentiary at Fort Madison (R. 20-21).

Also, on October 23, Attorney Henry Wormley was appointed to prosecute the appeal, with the county to provide a full transcript of the evidence of the trial (R. 20).

On December 3, 1964, the Clerk of Polk County District Court filed what is known as the "clerk's transcript", pursuant to Section 793.6 of the Code of Iowa. This is not the transcript of the evidence, Exhibit A, but rather contained the following as shown by the clerk's certificate:

> "I, Michael H. Doyle, Jr., Clerk of the District Court, within and for the County and State aforesaid, do hereby certify the foregoing to be a full, true and complete copy of the County Attorney Information, Minutes of Evidence (of the Grand Jury), Bailiff's Oath, Statement and Instructions, Letter, 3 Subpoenas, Motion for New Trial, Letter, and Notice of Appeal, and 10 Orders & Judgment Entry in the case of State of Iowa vs. Harvey Lyle Entsminger, Being Criminal No. 51568,

as full, true, correct and complete, as the same remains of record in my office" (R. p. 21).

The complete Clerk's transcript is shown at R. pp. 1-20.

On March 8, 1965, court appointed Attorney Henry Wormley filed at the Iowa Supreme Court a "Notice of Intention to File Printed Abstract of Record" directed to the Attorney General of Iowa, and stating:

> "You are hereby advised that the Defendant desires to submit the above entitled case upon a printed abstract of record and brief and argument" (R. p. 25).

On March 9, 1965, Attorney Wormley wrote petitioner that:

> "Your case was appealed to the Supreme Court and as soon as I receive the transcript from the Court Reporter, then I will make the record" (R. p. 30).

Attorney Wormley did not file any printed abstract or summary of the record nor did he file any brief and argument. Accordingly, under Iowa Supreme Court Rule 15, the case was submitted on the clerk's transcript only and the conviction was affirmed on October 19, 1965, with the following per curiam opinion:

> "Defendant was charged by county attorney's information with the crime of uttering a forged instrument as defined in Section 718.2, Code 1962. He pleaded not guilty, was tried before court and jury, found guilty and was sentenced to an indeterminate term not to exceed ten years in the men's penitentiary at Fort Madison. Defendant's appeal comes to us upon a clerk's transcript which includes the trial court's instructions

to the jury. Our study of the record before us discloses no error. The judgment is—Affirmed" (R. 33).

An analysis of all of the criminal appeals taken to the Iowa Supreme Court over the past 15 years discloses no case where an appeal taken on a clerk's transcript has been reversed.

Petitioner's petition for writ of certiorari was granted by the United States Supreme Court on June 20, 1966 (R. 35).

On or about October 10, 1966, Attorney David W. Belin of the Des Moines, Iowa, Bar was appointed by this Supreme Court to represent the petitioner.

Summary of Argument

Under Iowa law, petitioner had an appeal as a matter of right. Petitioner, an indigent, did not receive effective assistance from his court-appointed counsel, who failed to file any transcript or abstract of record before the Iowa Supreme Court and who also failed to file any brief or argument. Therefore, pursuant to Iowa statute and State Supreme Court Rules, the case was submitted to the Iowa Supreme Court on a "Clerk's Transcript", which is not a transcript of the evidence but rather is a collection of miscellaneous documents and papers. The clerk's transcript system is a whitewash form of appeal, totally void of substance. It is either *per se* unconstitutional or, in the alternative, it may not be used to dispose of indigent criminal appeals without adequate safeguards to guarantee that indigent criminal defendants such as petitioner will have due process and equal protection of the law, which petitioner did not have under the facts of this case.

The constitutional rights of petitioner were also violated because he did not have effective assistance of counsel. Although court-appointed counsel advised petitioner and served notice on the Attorney General that a printed record on appeal and a printed brief and argument would be filed on behalf of petitioner, in fact court-appointed counsel did absolutely nothing. Total inaction surely cannot be held to be effective assistance of counsel.

If counsel would have effectively assisted petitioner, at the very least he would have prepared a record and a brief and argument concerning the ultimate merits of the appeal, for the facts showed that the private written communications of the petitioner were unconstitutionally used as evidence against him by the prosecution. These personal papers were removed from petitioner's possession and placed in a safe at the Des Moines city jail at the time of initial booking. They were removed from the safe by the state without the consent of the petitioner and without warrant and were used by a police officer for evidentiary purposes of handwriting comparison in a prosecution for uttering a forged instrument. Under the facts in this case, it was a violation of petitioner's rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

ARGUMENT

I.

There Was a Violation of the Constitutional Rights of the Indigent Petitioner Under the Fourteenth Amendment to the United States Constitution Where He Had an Appeal as a Matter of Right Under Iowa Law and Where State Appellate Procedure (1) Gave to Petitioner's Court-Appointed Counsel Unreviewable Discretion to Decline, Without Petitioner's Consent, to Submit on Appeal a Transcript, Abstract or Summary of the Trial Record or Brief or Argument in Support of the Appeal, and (2) Permitted the Appellate Court to Affirm Petitioner's Conviction Solely on the Basis of a Collection of Miscellaneous Papers Known as a "Clerk's Transcript", Which Does Not Include a Transcript, Abstract or Summary of the Trial Record or a Brief or Argument in Connection Therewith.

> "The matter of appeal by a defendant in a criminal case is not discretionary in Iowa. He may appeal as a matter of right. Section 793.1, Code, 1962, provides that either the defendant or state may appeal." *Weaver* v. *Herrick*, 140 N.W.2d 178, 180 (Iowa 1966).

The equal protection clause of the Fourteenth Amendment requires that where an indigent has as of right an appeal, the state must furnish counsel at its own expense. *Douglas* v. *California*, 372 U.S. 353 (1963). Where there is no counsel,

> ". . . only the barren record speaks for the indigent, and, unless the printed pages show that an injustice has been committed, he is forced to go without a cham-

pion on appeal. Any real chance he may have had of showing that his appeal has hidden merit is deprived him when the court decides on an *ex parte* examination of the record that the assistance of counsel is not required." 372 U.S. at 356.

In the case at bar, the error of the California courts in *Douglas v. California, supra,* was compounded: Petitioner Entsminger had no counsel championing his cause on appeal and moreover the Iowa Supreme Court did not have a satisfactory record upon which to make even an *ex parte* examination. Rather, the only thing before the Supreme Court of Iowa was a "clerk's transcript". The clerk's transcript is defined by Section 793.6 of the Code of Iowa, 1962, to include "... all record entries in the cause, together with copies of all papers in the case on file in his office, except those returned by the examining magistrate on the preliminary examination, all duly certified under the seal" of the clerk of court. Thus, the clerk's transcript has absolutely nothing whatsoever to do with the transcript of the evidence of the trial.

What happened in this case was that the court-appointed attorney, Henry Wormley, did nothing after serving notice on the Attorney General of Iowa that he (Wormley) desired to submit the case upon a printed abstract of record and brief and argument. By operation of Iowa Supreme Court Rules 15 and 16, the case was then submitted on a clerk's transcript.

Since the Iowa Supreme Court did not have the benefit of the record in the case, and did not have the benefit of any briefs and arguments of counsel, it had one of two choices: (1) the Court could affirm the conviction on the

basis of the purported record before it; (2) the Court could have directed Mr. Wormley to bring before the Court the record and a brief and argument or in the alternative could have caused another attorney to be appointed to represent petitioner Entsminger.

The Iowa Supreme Court elected the first alternative and summarily affirmed the conviction at 137 N.W.2d 381.

Although in form, the clerk's transcript system provides for a method of appeal before the Iowa Supreme Court, in substance this method of appeal is a "white wash". According to an analysis by Gilbert Cranberg of the editorial staff of the *Des Moines Register*, there are ". . . 30 to 40 criminal cases decided each year by the Iowa Supreme Court on the basis of . . . 'clerk's transcript' appeals." See Cranberg, "Right of Poor to Full Court Appeal", November 14, 1965, *Des Moines Register*. This means that over the past fifteen years approximately 500 clerk transcript appeals have been decided. An analysis of all clerk transcript appeals before the Iowa Supreme Court in the past fifteen years has disclosed no case where a conviction by a trial court was reversed on a clerk's transcript appeal. *Res ipsa loquitur.*

This Supreme Court held in *Eskridge* v. *Washington State Board,* 357 U.S. 214 (1958) that even though a transcript might not be a legal prerequisite to appeal, it could not be withheld from an indigent upon a mere unreviewable finding by the trial court that "justice would not be promoted" by providing the transcript. Similarly, *Draper* v. *State of Washington,* 372 U.S. 487 (1963), established that a transcript may not be denied an indigent upon the unreviewable finding by a trial court that an appeal would be

"frivolous." These cases clearly indicate the justifiable view taken by this Court that full and adequate appellate review cannot be secured, in fact, unless the reviewing court has before it *some* kind of transcript, abstract, or complete summary of the trial record.

In *Draper* at 372 U.S. 497:

> "The materials before the State Supreme Court in this case did not constitute a 'record of sufficient completeness,' see *Coppedge* v. *United States,* 369 U.S. 438, 446, 82 S.Ct. 917, 921, 8 L.Ed.2d 21, and p. 780 for adequate consideration of the errors assigned. No relevant portions of the stenographic transcript were before it. The only available description of what occurred at the trial was the summary findings of the trial court and the counter-affidavit filed by the prosecutor. The former was not in any sense like a full narrative statement based upon the detailed minutes of a judge kept during trial. It was, so far as we know, premised upon recollections as of a time nearly three months after trial and, far from being a narrative or summary of the actual testimony at the trial, was merely a set of conclusions. The prosecutor's affidavit can by no stretch of the imagination be analogized to a bystander's bill of exceptions. The fact recitals in it were in most summary form, were prepared by an advocate seeking denial of a motion for free transcript, and were contested by petitioners and their counsel at the hearing on that motion."

Justice White in his dissenting opinion in the *Draper* case urged that the record before the Washington Supreme

Court was an adequate record substantially equivalent to a transcript and was therefore satisfactory:

> "Following petitioners' conviction and the denial of the motion for a new trial, petitioners filed a motion before the trial court setting forth their claimed errors and requesting a transcript for purposes of appeal. The State, opposing the request for a transcript, responded by presenting the evidence at the trial in a narrative form by affidavit of the prosecuting attorney. A hearing was held at which both the attorney who represented the petitioners at the trial and the petitioners themselves were free to challenge the accuracy of the State's narrative of the facts or to supplement it in any way. The statements and arguments of petitioners and their attorney at the hearing were included in the material before the Supreme Court and added considerably to the State's summary, as did the court's oral opinion and the colloquies between the court and petitioner Draper. Finally, the court, as it was required to do, entered findings of fact setting forth the evidence at the trial and ruling upon each error claimed by petitioners. The findings, as well as the court's statements during the conduct of the hearing, went substantially beyond the summary presented by the State and were expressly intended by the trial judge to set forth the 'substance of the testimony' so that the matters relied upon by petitioners could be presented to the Washington Supreme Court.
>
> "We thus have a situation where the court, in good faith, utilizing its own knowledge and information about the trial and with the help of the State, the defendants and their counsel, in effect prepared and

> settled a narrative statement of the evidence for the use of the appellate court in passing upon the merits of the alleged errors. The record before the Washington Supreme Court contained not only the findings made by the trial judge after a hearing, but also everything said at the hearing by the defendants, by their attorney and by the prosecutor. Furthermore, briefs were filed in the Supreme Court of Washington and the court heard oral argument by appointed counsel." See 372 U.S. 500-501.

In other words, in *Draper* this Court agreed unanimously that there must be some kind of adequate record before the appellate court.

In contrast to the *Draper* case, the Iowa Supreme Court in this case had no transcript nor did it have an adequate record substantially equivalent to the transcript. Moreover, no briefs were filed by the court-appointed counsel nor was there any oral argument. Rather, there was a total default on the part of the appointed counsel.

Once counsel has been appointed, it is his duty to provide his client "effective aid in the preparation . . . of the case." *Powell* v. *Alabama,* 287 U.S. 45 (1932). The definition of "effective aid" is fraught with difficulty, once counsel has acted. If hindsight is used to judge the actions or mistakes of court-appointed counsel, the flood gates could be opened to spurious petitions. Thus, courts have been generally unwilling to review the wisdom of trial tactics where court-appointed attorneys actually participated in the defense of an indigent. See note, "Effective Assistance of Counsel for the Indigent Defendant", 78 Harvard Law

Review 1434 (1964-1965) and note, "Effective Assistance of Counsel", 49 Va. L. Rev. 1531, 1540-42 (1963).

However, in the case at bar we are not faced with any such problems, for surely there can be no argument that total default of action is not effective assistance of counsel for the indigent defendant.

It is well established that courts have a responsibility beyond the naked appointment of counsel to represent an indigent; the representation must not only be in form, but it must have effective substance. This principle has been applied to trial as well as to appellate court appointment. In *Glasser* v. *United States*, 315 U.S. 60 (1942) appointed counsel was required by the trial court to represent two indigent defendants with possibly conflicting interests. Although that case arose more than twenty years before *Gideon* v. *Wainwright*, 372 U.S. 792 (1963), this court stated:

> "Even as we have held that the right to assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment, *Powell* v. *Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527, so are we clear that the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than

this, a valued constitutional safeguard is substantially impaired." 315 U.S. 70. See also *Avery* v. *Alabama*, 308 U.S. 444 (1940).

In 1963 this Supreme Court decided *Lane* v. *Brown*, 372 U.S. 477 (1963) in which the Public Defender refused to represent the indigent Brown on appeal because of a stated belief that an appeal would be unsuccessful. Brown next applied to the State Trial Court for a transcript and appointment of counsel, and this was refused. At 372 U.S. 485, the Supreme Court concluded:

> "The provision before us confers upon a state officer outside the judicial system power to take from an indigent all hope of any appeal at all. Such a procedure, based on indigency alone, does not meet constitutional standards."

In a separate concurring opinion Justice Harlan stated at 372 U.S. 485-486:

> "I think it falls short of the requirements of due process for a State to foreclose an indigent from appealing in a case such as this at the unreviewable discretion of a Public Defender by whom, or by whose office, the indigent has been represented at the trial. It ignores the human equation not to recognize the possibility that a Public Defender, so circumstanced may decide not to appeal questions which a lawyer who has had no previous connection with the case might consider worthy of appellate review. (I do not of course remotely intimate that such is the situation here.)
>
> Were it clear that the decision of this Public Defender not to appeal had been subject to judicial review at the

instance of the prisoner, I should have voted to sustain this conviction. However, the State Attorney General has candidly informed us that the Indiana law is unclear on this score."

There is no lack of clarity in the Iowa law. Where appointed counsel does nothing to file a printed abstract of record or a brief and argument, the case automatically goes up on the "Clerk's transcript".

It is the Clerk's transcript system which permits *sub rosa* withdrawals by counsel by providing the form of appellate review with total lack of substance. On March 9, 1965, the court-appointed attorney Henry Wormley wrote petitioner:

"... Your case was appealed to the Supreme Court and as soon as I receive the transcript from the Court Reporter, then I will make the record.

I am not unmindful of the time that past and the rules of the Supreme Court. As to how I present this case and what I put in the Brief and argument will be matters that I will pass upon accordingly to my best Judgment ...

... When the papers have been prepared, they will be forwarded and I do not have the time to write you as to every move that I make in this case" (R. 30).

The record, when completed, did show what court-appointed attorney Henry Wormley had taken care of: Nothing. And the Clerk's transcript system took care of Wormley's default.

The Petitioner therefore prays that this Supreme Court hold either that the Clerk's transcript system is *per se* un-

constitutional or in the alternative, that it may not be used to dispose of an indigent criminal appeal unless there are established safeguards which were not present in this case to guarantee that indigent criminal defendants will have due process and equal protection of the laws under the Constitution of the United States.

II.

Where Iowa Law Provides for Appeal as a Matter of Right, and Where the Lawyer Appointed by the Court to Represent the Indigent Petitioner Did Nothing to Prepare and File a Transcript, Abstract or Summary of the Trial Record or Brief or Argument on Appeal, Petitioner Was Denied the Effective Assistance of Counsel in Violation of the Sixth and Fourteenth Amendments to the United States Constitution.

Petitioner Entsminger desired to take an appeal to the Iowa Supreme Court from his trial court conviction. Pursuant to his request a new attorney, Henry Wormley, on October 23, 1964, was appointed to take an appeal on behalf of the petitioner to the Iowa Supreme Court (R. p. 20). The State provided at its own expense a transcript (see Exhibit A) of the entire trial (R. p. 20).

On March 8, 1965, Attorney Wormley served the Attorney General of Iowa notice advising "that the defendant desires to submit the above-entitled case upon a printed abstract of record and brief and argument" (R. p. 25).

The very next day Attorney Wormley wrote the defendant that he (Wormley) would prepare the record and would exercise his best judgment in determining how to

present the case and "what I will put in the brief and argument . . ." (R. p. 30).

The judgment of Attorney Wormley was to do nothing. On October 8, 1965, Petitioner Entsminger filed a petition for a writ of certiorari in the Supreme Court of Iowa which alleged the appointment of Wormley to represent him, the statement by Wormley in a March 9 letter to petitioner that the record and brief and argument would be prepared by Wormley, and a letter dated September 1 from Wormley alleging that the case would be decided on the "record" (R. pp. 27-29. See Exhibit 2, R. pp. 31-32). In the concluding allegation in his petition for writ of certiorari to the Supreme Court of Iowa, Petitioner Entsminger alleges: "Plaintiff has ineffective assistance of counsel on the one appeal plaintiff has as of right" (R. p. 29).

On October 18, 1965, the Supreme Court of Iowa entered an order denying the petition for writ of certiorari on the ground ". . . it is not filed within the time provided by Rule 319, Rules of Civil Procedure" (R. p. 32). (Rule 319 declares: "No writ of certiorari shall issue or be sustained unless the petition is filed within six months from the time the inferior tribunal, board or officer exceeded its jurisdiction or otherwise acted illegally.")

These facts speak for themselves. What we have is the mere formality of an attorney appointed by the court to represent an indigent defendant on the one appeal he has as a matter of right. But the formal appointment is void of any substance. Petitioner believes that under the record in this case there has been a violation of his rights guaranteed under the Constitution of the United States. Let us examine the cases.

Our starting point is that the State of Iowa does allow an appeal to its Supreme Court as a matter of right. *Weaver* v. *Herrick*, 140 N.W. 2d 178 (1966); Section 793.1, Code of Iowa, 1962.

Where under state law a defendant has an appeal as a matter of right, this Court has held that the equal protection clause of the Fourteenth Amendment requires that an indigent be afforded counsel on appeal. *Douglas* v. *California*, 372 U.S. 353 (1963). In *Douglas*, this Court declared:

> "• • • But where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.
>
> • • • There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal." 372 U.S. at 357-358.

Given these reasons for requiring the appointment of counsel, it is obvious that there is an implicit requirement that an indigent's right to counsel on appeal cannot be satisfied by the mere formal appointment of a member of the bar, who, after his appointment, does nothing to assist the indigent in prosecuting the appeal.

This right to an effective appointment of counsel has been recognized by this Court in trial situations. *Powell* v. *Alabama,* 287 U.S. 45 (1932), *Glasser* v. *United States,* 315 U.S. 457 (1942). But it has never explicitly been recognized by this Court to exist in an appellate situation.

That it does so exist is implicit in the phrase, "equal protection of the laws". This Court has never held that equal protection of the laws can be satisfied by a mere hollow formality. Moreover, there surely can be no difficulty for the purposes of the Fourteenth Amendment in attributing to the state the whole ineffective assistance of counsel caused directly by the activities of a court-appointed attorney. *Schaber* v. *Maxwell,* 348 F.2d 664 (6th Cir.), *United States, ex rel. Taylor* v. *Reincke,* 225 F.Supp. 985 (D.Conn. 1964), *Coffman* v. *Bomar,* 220 F.Supp. 343 (M.D. Tenn. 1963), *Grubbs* v. *Oklahoma,* 239 F.Supp. 1014 (E.D. Okla. 1965).

However, assuming arguendo that in the usual case there would be hesitation in imputing failures of appointed counsel to the state for purposes of the Fourteenth Amendment, there is in this case an added element which demands such imputation. That element is that when petitioner filed his "Petition for Writ of Certiorari", the Iowa Supreme Court was made aware that counsel's allowing the case to be submitted on a clerk's transcript was done without the approval of the petitioner (R. 27-29). Nevertheless, the Court failed to investigate the situation or to require some explanation from petitioner's counsel. Therefore, it is clear that counsel's failure can easily in this case be imputed to the Supreme Court of Iowa.

Moreover, as shown in the Appendix, *infra,* petitioner received correspondence from the Assistant Attorney Gen-

eral of Iowa which misled petitioner to assume that his appeal was being diligently prosecuted.

Unfortunately, petitioner's assumption of effective representation was false. His court-appointed counsel on appeal made no argument to the appellate court, submitted no briefs, and did not even cause a copy of the trial transcript to be deposited with the Supreme Court of Iowa. Except for an occasional letter to the petitioner, counsel took only two actions in regard to the appeal: He filed a timely "Notice of Appeal", R. 14; and he filed an untimely "Notice of Intention to File Printed Abstract of Record" (R. 25). Of course, this latter notice was of no consequence because no printed abstract of record was ever filed by counsel.

From petitioner's point of view, this inactivity was made even more cruel than it might otherwise have been by continual representations by his counsel that the appeal would be prosecuted fully. In his "Petition for Writ of Certiorari" to the Supreme Court of Iowa, petitioner enclosed as exhibits letters from his counsel to him; in one of these letters, counsel told petitioner, "Your case was appealed to the Supreme Court and as soon as I receive the transcript from the Court Reporter, then I will make the Record" (R. 30).

In addition, petitioner's belief that a full appeal was in progress was encouraged by the reasonable assumptions of the Assistant Attorney General expressed in letters to petitioner that there would be a complete appeal. See Appendix to Brief. It was not until shortly before petitioner submitted his "Petition for Writ of Certiorari" to the Supreme Court of Iowa that he was finally informed, more than ten months after the Notice of Appeal was filed,

that his counsel did not intend to prosecute fully the appeal (even though Wormley had seven months earlier submitted notice that he intended to do so (R. 25)). As a result of these representations and vacillations by counsel, petitioner was reasonably led to believe that he would receive a complete appeal. But what petitioner really received was nothing.

Although the record indicates otherwise, it is possible that counsel for petitioner made a good faith decision at some time not to prosecute the appeal because he believed there were no grounds for appeal. Even so, such a decision, if it occurred, occurred too late. The Supreme Court of Iowa waited seven months for counsel to carry out his written stated intention to submit the appeal on printed abstracts, briefs and arguments. Counsel filed nothing. Therefore, the Iowa Supreme Court assumed that the appeal would be prosecuted no further and in accordance with Supreme Court Rules 15 and 16 reviewed petitioner's conviction by means of its dubious automatic clerk's transcript procedure. Counsel, late even in filing notices of intentions which were never carried out, clearly was not effective counsel on appeal.

In circumstances very similar to the case presently before the Court, lower Federal Courts have found denials of due process and equal protection. In *Coffman* v. *Bomar*, 220 F.Supp. 343 (M.D. Tenn. 1963), counsel for an indigent failed to file a timely Bill of Exceptions as required by local state procedure. The Court assumed that the failure was in good faith, but it nevertheless stated at 220 F.Supp. 348:

> "Moreover, the decision of the attorneys not to appeal, contrary to the wishes of petitioner, coupled with their

failure to so advise the petitioner, even conceding that there was no lack of good intent, amounted to an actual deception, just as effectively depriving him of his right to appeal as did the suppression of documents by prison wardens in the Cochran and Dowd cases."

The Court then continued at 220 F.Supp. 348-349:

"As a part of its system of appellate review to protect indigent defendants Tennessee has placed definite responsibilities in capital cases upon the trial judge, the official court reporter, the clerk, and upon court-appointed counsel to take the necessary procedural steps to effectuate an appeal. The clear meaning of the controlling statutes is that the duty of court-appointed counsel in such cases does not end with the filing of a new trial motion but continues at least to the point that they are required to file a timely bill of exceptions to the end that the right of an appellate review may not be lost. The same statute further provides that in the event of an appeal court-appointed counsel shall be entitled to receive from the state mileage at a prescribed rate from the town of his residence to the point where the Supreme Court shall sit. T.C.A. Section 40-2013. Thus, court-appointed counsel in such cases in a very real sense constitute a part of the system whereby the state in capital cases seeks to protect the indigent defendant with respect to an appellate review of his conviction. Having in these cases specific statutory duties to perform in connection with an appeal not imposed upon attorneys generally, any default on their part in this respect must be attributed to the state in testing the application of the Fourteenth Amendment."

A similar situation arose in *Grubbs* v. *Oklahoma*, 239 F. Supp. 1014 (E.D. Okla. 1965). The record showed that:

> ". . . whereas the public defender considered himself as the attorney for the petitioner for appellate purposes and assumed the responsibilities as such that in fact he rendered the petitioner no legal assistance in connection with this appeal to include not only not giving the necessary notice of appeal but took no steps to obtain an extension of time to make and serve case-made, to obtain for petitioner the continued status as an indigent, request the trial record and case-made at state expense on the basis of indigency, or take any of the other customary steps in connection with perfecting an appeal. Nor did the public defender request permission of the Court to withdraw as attorney for the petitioner for the purposes of appeal. The record does not disclose that the public defender reported his feelings about not appealing the case to the state trial court. Under these circumstances the state trial court did not, of course, explain to the petitioner his rights and essential procedures in connection with an appeal, and did not appoint other counsel for petitioner. And the petitioner having the right to consider himself as being represented on appeal by the public defender did not make request of the state trial court for the appointment of other counsel for the purposes of his appeal until about June 30, 1964, in a document filed with the trial Court he stated he was without the assistance of counsel. The Court did not then appoint other counsel."

See 239 F.Supp. 1016-107.

The Court concluded that the petitioner's constitutional right of appeal and his right to the equal protection of the laws was denied because of the ineffective assistance by the Court-appointed counsel " . . . not conforming to the wish of his client and taking the necessary action to protect his rights by appealing his conviction and sentence. It would appear that the decision not to lodge an appeal is a personal decision residing in the convicted individual and it is not a matter resting within the exclusive discretion and authority of his counsel whether court-appointed or not." 239 F.Supp. at 1018.

Petitioner has extensively quoted from these lower federal court decisions because petitioner believes that these courts have stated petitioner's argument extremely well in analogous factual situations.

This Supreme Court has in the past imposed careful safeguards to prevent depriving an indigent of a full appeal when such an appeal may be warranted.

In *Burns* v. *State of Ohio,* 360 U.S. 252 (1959), this Court held that a state law requiring a filing fee as a requisite to a direct appeal violated the Fourteenth Amendment. In *Griffin* v. *Illinois,* 351 U.S. 12 (1956), this Court held that the Fourteenth Amendment requires the State to provide a transcript to an indigent for purposes of appeal, at least where State law makes the filing of a transcript a requisite to appeal. In *Eskridge* v. *Washington State Board,* 357 U.S. 214 (1958), this Court held the Fourteenth Amendment was violated when a transcript was denied an indigent (without review) after a preliminary determination by the trial court under a state statute allowing the trial court to furnish a free transcript only "if in his opinion justice

will be thereby promoted." In *Draper* v. *Washington, supra,* this Court held the Fourteenth Amendment was violated when the only review secured by the indigent was appellate review of the trial court's refusal, on the grounds of frivolity, to furnish a transcript when such appellate review had the benefit only of a record of the trial court hearing on the issue of frivolity, and no record of what occurred at the trial. The *Draper* case clearly establishes that a transcript or adequate substitute may not be denied an indigent by the unreviewable preliminary determination of the trial court.

In *Lane* v. *Brown,* 372 U.S. 477 (1963), the Court struck down a provision which conferred ". . . upon a state appointed officer outside the judicial system power to take from an indigent all hope of any appeal at all." See 372 U.S. at 475. The facts at bar disclose that the court appointed attorney, through total inaction, in substance exercised this same power that was held unconstitutional in *Lane.* If it is unconstitutional for a court appointed attorney to affirmatively exercise unreviewable discretion to prevent an appeal, how can it be constitutional for a court appointed attorney, through default, to reach the same effective result?

In *Ellis* v. *United States,* 356 U.S. 674 (1958), this Court made clear that, at least in the Federal Court System, the appellate court must establish certain safeguards to assure that counsel for an indigent examines the record from the stance of an advocate, and does not withdraw if there is a possibility of grounds for appeal. This Court stated, at 356 U.S. 675:

"• • • In this case, it appears that the two attorneys appointed by the Court of Appeals, performed essentially the role of *amici curiae.* But representation in the role of an advocate is required. If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account. If *the court is satisfied* that counsel has diligently investigated the possible grounds of appeal, *and agrees* with counsel's evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied." (Emphasis supplied.)

Lower federal courts have imposed additional safeguards to prevent withdrawal of counsel for indigents when there may be possible grounds of appeal. In *Tate* v. *United States,* 359 F.2d 245 (D.C.Cir. 1966), and *Johnson* v. *United States,* 360 F.2d 844 (D.C.Cir. 1966), the Court of Appeals for the District of Columbia Circuit established that before counsel will be permitted to withdraw, he must submit to the court a statement, which "is to be similar to a brief," *Johnson* v. *United States,* 360 F.2d at 845, in order to report fully that no nonfrivolous issues are present. Petitioner contends that the policy of *Ellis* v. *United States* is more than a policy of the Federal Court System.

The United States Constitution requires that where an indigent criminal has an appeal as a matter of state right, no court appointed counsel has the unreviewable discretion to destroy that right of appeal through unsupervised default or withdrawal. Petitioner is not asking for any new extension or interpretation of the United States Constitution, for indeed the foundation for petitioner's position is well within the framework of *Douglas* and *Griffin.* Inherent in the basic doctrine established by *Douglas* and *Griffin* of

equal access to the appellate system of our states is the principle of a Constitutional safeguard so that an indigent will not be deprived of a full and adequate review at the mere whim or caprice of his court appointed counsel.

(The need for such a safeguard is all the more illustrated where there are procedures similar to the "clerk's transcript" system in Iowa, which automatically covers up the default of the court appointed counsel.)

In the Federal Court system, an indigent may, in some circumstances, be deprived of a full and adequate appeal by a finding by both the District Court and the Court of Appeals, that his appeal *in forma pauperis* is not taken in good faith, *28 U.S.C. Sec. 1915(a). Coppedge* v. *United States,* 269 U.S. 438 (1962), however, establishes for the Federal system the same safeguards which were subsequently established for the states by *Draper.* Under *Coppedge,* if the District Court finds the appeal *in forma pauperis* not to be in good faith, the Court of Appeals, merely from an examination of papers other than the transcript, may nevertheless *grant* to the indigent a full and adequate appeal. However, if the Court of Appeals is not disposed to grant leave to appeal *in forma pauperis* after such a perusal, it must follow the strict safeguards established by this Court. These safeguards include both the assistance of counsel and a record of sufficient completeness:

> "• • • If, on the other hand, the claims made or the issues sought to be raised by the applicant are such that their substance cannot adequately be ascertained from the face of the defendant's application, the Court of Appeals must provide the would-be appellant with both the assistance of counsel and a record of sufficient

completeness to enable him to attempt to make a showing that the District Court's certificate of lack of 'good faith' is in error and that leave to proceed with the appeal *in forma pauperis* should be allowed. If, with such aid, the applicant then presents any issue for the Court's consideration not clearly frivolous, leave to proceed *in forma pauperis* must be allowed." *Coppedge* v. *United States*, 369 U.S. at 446.

Relatively crude and direct deprivations by the State of full and adequate appeals have also been held unconstitutional, such as the disallowance by prison officials of correspondence between a prisoner and the appellate court, *Dowd* v. *United States*, 340 U.S. 206 (1951), and failure of courts and clerks to answer inartistic requests from indigents. *Coffman* v. *Bomar, supra, Kershner* v. *Boles*, 212 F.Supp. 9 (N.D.W.Va. 1963), affirmed 320 F.2d 284, cert. denied 372 U.S. 923.

Under all of these authorities the principle is clear: Equal protection must be more than mere sham of form; equal protection demands substance, and under the facts of this case, the appointment of counsel was totally lacking in substantive effect.

The only remaining question concerns whether or not petitioner consented or acquiesced in the activities of his court-appointed counsel. On this the record is clear. From the moment of his conviction, petitioner expressed a desire to appeal. See Exhibit "B". He was affirmatively led by his counsel to believe that a full appeal was in progress (R. 30). He was also led by the Assistant Attorney General of Iowa to believe that the court-appointed counsel would diligently prosecute the appeal. See Appendix. Finally, when petitioner found out his counsel's belated decision not

to prosecute fully the appeal, petitioner filed a *pro se* petition for certiorari to the Supreme Court of Iowa in which he specifically complained of the conduct of his counsel (R. 27-29). Paradoxically, petitioner assumed that the Iowa Supreme Court would have before it the full record of the trial court. No doubt this assumption was based on the correspondence of appointed counsel that at least the Supreme Court would have the record before it (R. 31-32).

Under the record in this case, petitioner respectfully submits that he did not receive the equal protection of law and the due process of law guaranteed to this petitioner under the Fourteenth Amendment to the Constitution of the United States.

III.

Where the Private Correspondence of an Accused Is Removed From His Possession and Placed in a Jail Safe at the Time of His Initial Booking, and Where Without the Consent of the Defendant and Without Warrant These Personal Papers Are Removed From the Safe by the State for Evidentiary Purposes of Handwriting Comparison in a Prosecution for Uttering a Forged Instrument, There Is a Violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and a Violation of Article I, Sections 8, 9 and 10 of the Constitution of the State of Iowa.

At the time of his arrest, petitioner's personal correspondence was taken away from him and placed for safekeeping purposes in a safe in the Des Moines city jail. Without his consent, and without warrant, these personal papers were taken by a Des Moines police officer and used for evidentiary purposes of handwriting comparison to prove

a forgery. The testimony of this police officer, over objection, was introduced into evidence against petitioner and formed an important part of the prosecution's case (see Exhibit A). Under these circumstances petitioner claims a violation of the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States and also claims a violation of Sections 8, 9 and 10 of Article I of the Constitution of the State of Iowa.

The letters seized by the police in this case were personal communications of the petitioner. They did not relate to any crime. Thus, the seizure and use as evidence of petitioner's papers in this case is distinct and different from the seizure and use sanctioned by this Court in *Stroud* v. *United States,* 251 U.S. 15 (1919), in which incriminating letters written by the accused while he was in prison, and in regard to a crime occurring while he was in prison, were censored by the warden and turned over to the prosecutor's office. The court in that case emphasized that the letters came into the warden's hands under established censorship procedures of which the defendant was aware. In addition, the *Stroud* case is clearly distinguishable from the present case in that in *Stroud,* the accused was a convicted prisoner at the time the letters were secured by the warden: If there is justification for infringing the civil rights and the privacy of a convicted prison inmate in regard to letters written by him while in prison, this justification does not apply to an arrestee in regard to letters written by him before he was arrested, especially when he has not attempted to mail or remove the letters from their place of safekeeping in the jail and where the contents of the letters do not relate to and are not even suspected of relating to the actual commission of a crime.

The mere fact that a search is legal, or that the police have physical possession of an accused's property, does not, of course, mean that any such property in their possession or discovered during a legal search may be seized for use as mere evidence against the accused. As this Court stated in *Abel* v. *United States*, 362 U.S. 217 (1960):

> "... We have held in this regard that not every item may be seized which is properly inspectible by the Government in the course of a legal search; for example, private papers desired by the Government merely for use as evidence may not be seized, no matter how lawful the search which discovers them, *Gouled* v. *United States*, 255 U.S. 298."

Generally, the delineation between what may be seized and what may not be seized in a lawful search has been between contraband and instrumentalities on the one hand, and mere evidence on the other. The historical and policy justifications for this distinction were well explained by this Court in *Gouled* v. *United States*, 255 U.S. 298, 308-9 (1920), when this Court stated:

> "... at the time the Constitution was adopted stolen or forfeited property, or property liable to duties and concealed to avoid payment of them, excisable articles and books required by law to be kept with respect to them, counterfeit coin, burglars' tools and weapons, implements of gambling 'and many other things of like character' might be searched for in home or office and if found might be seized, under search warrants, lawfully applied for, issued and executed.
>
> "Although search warrants have thus been used in many cases ever since the adoption of the Constitution,

and although their use has been extended from time to time to meet new cases within the old rules, nevertheless it is clear that, at common law and as the result of the *Boyd* and *Weeks Cases, supra,* they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken. *Boyd Case,* pp. 623, 624.

"There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant. Stolen or forged papers have been so seized, *Langdon* v. *People,* 133 Illinois 382, and lottery tickets, under a statute prohibiting their possession with intent to sell them, *Commonwealth* v. *Dana,* 2 Metc. 329, and we cannot doubt that contracts may be so used as instruments or agencies for perpetrating frauds upon the Government as to give the public an interest in them which would justify the search for and seizure of them, under a properly issued search warrant, for the purpose of preventing further frauds."

Beyond these statements of principles contained in *Abel* and *Gouled*, it is difficult to harmonize the holdings of all search and seizure decisions within these principles. As this Court stated in *Abel*, 362 U.S. at 235, "The several cases on this subject in this court cannot be satisfactorily reconciled." The difficulty, however, is not limited to this Court; lower courts, in considering the introduction of evidence seized during custody searches or during searches of the person incident to arrest, have on occasion permitted the seizure and introduction of evidence which was neither contraband nor instrumentality, *United States* v. *Alvarado*, 321 F.2d 336 (1963). However, other cases permitting the introduction of evidence seized during custody searches have involved evidence that was clearly contraband or instrumentality, *Baskerville* v. *United States*, 227 F.2d 454 (10th Cir. 1955), *Charles* v. *United States*, 278 F.2d 386 (9th Cir. 1960). Even decisions of this Court, on occasion, have challenged persons attempting to blend the decisions into an easily understood law of search and seizure.

In *United States* v. *Lefkowitz*, 285 U.S. 452 (1931), the introduction of private papers as mere evidence seized during a search incident to an arrest was held unconstitutional where the search extended to drawers and cabinets in the room in which the accused was arrested. This Court, in *Lefkowitz*, devoted its entire discussion to the search of the room and the private papers found therein; it did not discuss, but necessarily affirmed, the Court of Appeals holding that the private papers found on the person of the accused at the time of arrest were admissible even though the papers were neither contraband nor instrumentality. This result is clearly difficult to reconcile with the statement

in *Abel* that "private papers desired by the government merely for use as evidence may not be seized, no matter how lawful the search which discovers them."

Thus, *Lefkowitz* cannot be read as holding that private papers are, per se, admissible unless it were contended that the statement in *Abel* and the holding in *Gouled* apply only to searches of premises and not of persons. Such an interpretation, however, would be a distinction without a difference, because the primary invasion of privacy has occurred in both cases; it is no less an invasion of privacy to examine private papers seized from one's person than to examine private papers seized from one's premises. The Court, in the *Abel* statement and the *Gouled* holding, clearly was not concerned with that primary invasion of privacy resulting from the search; the Court recognized that, even though one has already been subjected to a search, that there can be a further invasion of privacy in the seizure, inspection and reading of private documents found in the course of the lawful search. Petitioner contends that, even if the state had a right to take from him his private papers and to secure them in a safe place, it nevertheless had not the further right to examine, read, analyze and make public in a trial his private writings. This is so particularly, he contends, where it was evident from an initial inspection of the items that they were neither contraband nor an instrumentality of the crime.

A long line of cases of this Court has recognized the protection against invasion of privacy which is afforded by the Fourth Amendment's prohibition against unreasonable search and seizure. In *Boyd* v. *United States*, 116 U.S. 616 (1885), the accused was ordered by the court to produce his private papers. In *Boyd* there was no search, only

an attempted seizure. Therefore, this Court could not have been interested in the affront to privacy caused by unwelcome officials entering and disturbing an individual's premises. The Court could only have been concerned with the invasion of privacy which results from official examination of an individual's private papers. After making clear that it did not base its decision on the Fifth Amendment, the Court emphasized that the essence of the Fourth Amendment was a prohibition against unwarranted invasion of personal privacy:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. *It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.* Breaking into a house and opening boxes and drawers are circumstances of aggravation; but *any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment.* In this regard the Fourth and Fifth Amendments run almost into each other." *Boyd* v. *United States*, 116 U.S. 616, 630 (1885). (Emphasis supplied.)

Recently this Court reaffirmed these principles by quoting with approval the foregoing statement from *Boyd* in its landmark decision of *Mapp* v. *Ohio*, 367 U.S. 643 (1961), where this Court established that the exclusionary rule applies to the states through the Fourteenth Amendment. That decision makes necessary a reversal of petitioner's conviction if this Court finds that his private papers introduced into evidence were seized illegally.

In 1965, this Court once again emphasized that the underlying foundation of many specific provisions of the Bill of Rights was protection of individual privacy. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

Of course, petitioner recognizes that the right of privacy is not absolute. Thus, in its last determination this Court sanctioned certain invasions into the body of an accused in order that the state may more effectively control the danger to society caused by intoxicated drivers on the highway. *Schmerber* v. *California*, —— U.S. ——, 86 S.Ct. 1826 (1966).

In examining the privilege against self-incrimination claim, this Supreme Court stated at 86 S.Ct. 1832:

> "It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. *Boyd* v. *United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746. On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in

court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."

In the facts at bar the state seized a personal communication—not for the purposes of identification of the defendant but rather in essence to compel the defendant through his own personal communications to testify against himself where he was charged with uttering a forged instrument. Thus, the case at bar is distinguishable from *Schmerber* on the privilege against a self-incrimination claim.

It is also distinguishable from *Schmerber* on the search and seizure claim. We do not have the "special facts" of percentage of alcohol in the blood diminishing shortly after drinking stops and substantive destruction of the evidence by delay. We do not have any relationship between the communications seized and the perpetration of the crime. The papers were neither contraband nor instrumentalities of any crime.

To the state, these private communications were essential to petitioner's conviction. This is demonstrated by the record, Exhibit A. Accordingly, this Court must reverse petitioner's conviction and grant him a new trial to be held without the use of petitioner's private papers as evidence.

Petitioner is well aware of the fact that the record before the Iowa Supreme Court did not include the trial transcript, Exhibit A, and that consequently the Iowa Supreme Court did not have the opportunity to pass upon these

issues under the Constitution of the United States and the Constitution of the State of Iowa. Nevertheless, the entire transcript is before this United States Supreme Court as Exhibit A and petitioner respectfully prays that this Court reverse his conviction and grant him a new trial in accordance with the constitutional principles previously enunciated by this Supreme Court.

Of course, there is a great relationship between this Division III and Divisions I and II, *supra*. Surely, under the facts in this case the appeal of petitioner could not be deemed frivolous and accordingly, his constitutional rights were violated by the lack of effective assistance of counsel and the operation of the clerk's transcript system. As a matter of fact, the injury to petitioner was compounded because had petitioner received effective assistance of counsel, not only would such an appeal have presented to the Supreme Court of Iowa the federal constitutional questions in this Division III but in addition would have presented to the Iowa Supreme Court the similar questions arising under the state constitution.

The state constitutional questions are illustrated by such cases as *Commercial Exchange Bank* v. *McLeod*, 65 Iowa 665, 19 N.W. 329 (1884), which is applicable by analogy to the unreasonable search and seizure provision of the Iowa Constitution, Article I, Section 8. In that case, the Iowa Supreme Court held that property of an arrestee in the hands of a jailer for safekeeping purposes could not be attached. At 19 N.W. 330, the Iowa Supreme Court stated:

> "We think that it cannot be said that the search was unlawful, but when it was ascertained that the money and property were in no way connected with the offense

> charged, and was not held as evidence of the crime charged, the personal possession of the sheriff should be regarded as the personal possession of the prisoner, and the money and property should be no more liable to attachment than if they were in the prisoner's pockets."

Thus, Police Lt. Dawson could no more remove petitioner's personal communications from the jail safe, without consent of the petitioner, than he could have forcibly removed these papers from his pocket without a warrant.

Unfortunately, because of the lack of effective assistance of counsel and the operation of the clerk's transcript system, the Iowa Supreme Court did not fully review the state constitutional issues in this case. Be that as it may, as shown in this Division III petitioner's federal constitutional rights were violated under the record in this case. The written personal communications of petitioner were used to incriminate him in exactly the same manner as if he had been forced to testify against himself. Moreover, these personal papers were unconstitutionally seized from his person.

For all of the reasons set forth in this Division III, the conviction of petitioner should be reversed.

Conclusion

Every citizen of the State of Iowa as a matter of right can appeal from a felony conviction. The record conclusively shows that petitioner desired to exercise this right. Had he the monetary means, he would have retained competent counsel to present his claim and raise the constitutional issues discussed in Division III.

But petitioner did not have the funds and accordingly as an indigent sought and obtained appointment of counsel by the Iowa District Court. Unfortunately, the court-appointed counsel did not file any abstract or record on appeal. Unfortunately, the appointed counsel did not file any brief or argument. Perhaps this conduct of appointed counsel was through inadvertence or perhaps it was because of a conscious belief that there was no substantive basis for appeal. But regardless of the reason, the effect on petitioner was the same: He did not have effective assistance of counsel on appeal, as was his constitutional right.

What happened to fill the gap caused by this breach of effective assistance of counsel? The automatic operation of the Iowa statutory procedure of a clerk's transcript appeal. It was a sham. It was a whitewash. But nevertheless, it was a final adjudication of petitioner's rights in the state courts.

Petitioner submits that for all of the reasons set forth in Division III, his conviction should be set aside and a new trial granted because of the unconstitutional seizure and use of petitioner's personal communications. But even assuming arguendo, that there might be some disagreement about petitioner's claims in Division III, surely there can

be no disagreement about the fact that petitioner was entitled to have the effective assistance of counsel to present such claims before the Supreme Court of Iowa.

The Constitution of the United States requires more than the mere formality of the appointment of counsel. The Constitution of the United States requires more than the mere formality of a per curiam Supreme Court opinion where that court has never had before it the record of the trial below or any briefs or arguments. Petitioner therefore prays that his conviction be set aside.

Respectfully submitted,

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